

**STATEMENT OF ALAN D. LEBOWITZ
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EMPLOYEE BENEFITS SECURITY ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES**

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Chairman Davis, Ranking Member Waxman, and distinguished Members of the Committee:

I appreciate the opportunity to appear before you today to present information about the Federal Employee Retirement System (FERS), the Thrift Savings Plan (TSP), and the Labor Department's activities in this area. My name is Alan Lebowitz. I am the Deputy Assistant Secretary for Program Operations, of the Employee Benefits Security Administration, U.S. Department of Labor. Accompanying me are Timothy Hauser, Associate Solicitor of Labor for Plan Benefits Security, and William H. Bailey, Chief, FERSA Compliance.

THE EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Before describing the Labor Department's activities with the TSP, I would like to provide you with some background information specifically about the Employee Benefits Security Administration and our responsibilities.

EBSA currently oversees approximately 730,000 private pension plans and millions of private health and welfare plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA). The pension plans under our jurisdiction hold over \$4 trillion in assets and cover more than 45 million workers. EBSA employs a comprehensive, integrated approach encompassing programs for enforcement, compliance assistance, interpretive guidance, legislation, and research to protect and advance the retirement security of our nation's workers and retirees.

Title I of ERISA consists of provisions that establish standards of fiduciary conduct for persons who are responsible for the administration and management of pension and other benefit plans (including group health plans, life insurance, disability, dental plans, etc.). In addition, it establishes standards for the reporting of plan related financial and benefit information to the Department, and the disclosure of essential plan related information to participants and beneficiaries.

Under ERISA, fiduciaries are required to discharge their duties solely in the interest of plan participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration. In discharging their duties, fiduciaries must act prudently and in accordance with the documents governing

the plan. Certain transactions between an employee benefit plan and “parties in interest,” including fiduciaries and others who may be in a position to exercise improper influence over the plan, are prohibited by ERISA. If a fiduciary’s conduct fails to meet ERISA’s standards, the fiduciary is personally liable for plan losses attributable to such failure.

Because of the Department of Labor’s experience and expertise in the administration and enforcement of Title I of ERISA as it governs private sector employee benefit plans, Congress charged the Department with administering substantially similar provisions of law governing fiduciary conduct for the TSP under the Federal Employees’ Retirement System Act of 1986 (FERSA).

THE FEDERAL EMPLOYEES RETIREMENT SYSTEM

In FERSA, Congress created FERS, which generally follows the private sector model of providing retirement benefits through the combination of a modest defined benefit, Social Security, and a 401(k)-like tax advantaged savings plan, the TSP. For Federal workers hired after January 1, 1984 FERS takes the place of the old Civil Service Retirement System. Within FERS, the Labor Department's formal responsibilities are limited to the TSP.

THE THRIFT SAVINGS PLAN

Employing agencies contribute one percent of pay to an individual account for each worker covered by FERS. In addition, covered workers can choose to make pre-tax employee contributions to the TSP that are matched by employer contributions up to certain limits. CSRS employees may also make pre-tax contributions to the TSP, though there is no employer match for these contributions. Each contributing employee directs the investment of contributions to their individual account in four separate index funds and a U.S. government securities fund, known collectively as the Thrift Savings Fund.

The TSP is available to federal and postal workers, Members of Congress, Congressional employees, members of the Judicial Branch, and uniformed service members. Since its inception 17 years ago, the TSP has grown into a large, complex system. For example:

- o There are currently more than 3 million participants in the Thrift Savings Plan. The fund balances total over \$113 billion.
- o The number of participant loans and withdrawal disbursements has increased from approximately 50,000 in 1988 to 685,000 in 2002.
- o Total participant inquiries have increased from approximately 150,000 in 1989 to 2,037,000 in 2002.

In enacting FERSA, Congress established the Federal Retirement Thrift Investment Board (the Board) to administer the TSP. The Board is an independent agency of the Executive Branch. It has five members appointed by the President with the advice and consent of the Senate, and an Executive Director, appointed by the Board. The Board's principal statutory duties are to set policies for investment of the Thrift Savings Fund's assets and for administration of the TSP within the requirements of the Act. The Board selects appropriate indexes for the four index investment funds, but does not select specific investments. The Executive Director then carries out the policies established by the Board.

To ensure the integrity of the TSP, FERSA established rules for fiduciary responsibility, prohibited transactions, and bonding requirements. These standards are substantially similar to rules governing private sector pension plans under ERISA. The rules specify that the Board members and the Executive Director are fiduciaries of the Savings Fund. They and other fund fiduciaries must discharge their responsibilities prudently and solely in the interest of the participants and beneficiaries. Certain types of transactions that may create potential for abuse are prohibited unless they fall within an exemption provided in the statute or specifically granted by the Secretary of Labor.

As in ERISA, the Secretary of Labor has broad investigative and auditing authority concerning the activities of the Board and other fiduciaries of the fund. When FERSA was originally enacted in 1986, the Secretary also had authority similar to what she has under ERISA; to bring civil actions against the Fund's fiduciaries for breaches of their fiduciary responsibilities.

In 1988, in response to the lack of available fiduciary liability insurance, Congress amended the Act to specifically exclude suits by the Secretary against the Board members or the Executive Director. Participants and other fund fiduciaries may still sue the Board and the Executive Director, but the 1988 amendments do not permit any monetary recovery against these individuals. In addition, the 1988 amendments treat actions for recovery of losses to the Fund brought by participants and beneficiaries against Board members and the Executive Director as tort actions against the United States, which are defended by the Attorney General. The Department may, however, still bring actions for recovery of losses against other TSP fiduciaries, such as investment managers.

Section 8477(g) of FERSA specifically directs the Secretary of Labor to establish a program to carry out audits to determine the level of compliance with the Act's fiduciary standards and prohibitions on certain types of transactions. Under the statute, the Secretary may either contract with a qualified non-government organization, or may conduct the audit in cooperation with the Comptroller General of the United States. The Department has always elected to contract with a reputable accounting firm. Currently, KPMG LLP conducts the audits under supervision by the EBSA Chief Accountant.

THE THRIFT SAVINGS PLAN AUDIT PROGRAM

The Labor Department's program for fiduciary compliance audits of the TSP is designed to determine: (1) whether the plan's fiduciaries are acquiring, protecting, and using plan resources prudently, efficiently, and solely in the interest of participants and beneficiaries; (2) whether the fiduciaries have complied with FERSA and applicable laws and regulations; (3) whether the desired results or benefits established by FERSA are being achieved; (4) whether the plan program activities, functions, and organization are cost effective and efficient; and (5) whether the Department's previous plan compliance and control audit recommendations have been adequately acted upon.

To guide the auditors, the Department has developed a strategic fiduciary oversight program that uses detailed guides to test for compliance. These audit program guides cover all significant activities of the Fund, including the Board's policy formulation and administration; record keeping functions handled by the Agriculture Department's National Finance Center; functions of Federal agencies related to contributions and employee participation programs; and the CIA's separate system for its employees. The audits include on-site reviews of the Fund's principal service providers.

In response to concerns recently expressed about access to the TSP's website, we are planning in next year's audit cycle to review the TSP's customer service, loan and withdrawal subsystems.

At the conclusion of each audit, the Department issues a report for formal response by the Executive Director on behalf of the Board. The Department's representative and the contract auditor meet with the Board members at least once a year to highlight significant issues from the audit, to present the Department's future compliance audit schedule, and to answer Board members' questions.

The Department's audit recommendations range from statutory matters related to FERSA fiduciary compliance to economy and efficiency issues that may provide cost-saving opportunities for the TSP. Most significantly, the Department communicated many recommendations over several years addressing TSP system and software control weaknesses, which culminated in the TSP Board entirely replacing the TSP record keeping system in June 2003.

Although FERSA does not require the Board and Executive Director to adopt the Department's recommendations, disagreements are rare and generally are due to the timing or the form of implementation rather than to outright refusal. Since the inception of the audit program, the Department has made over 800 recommendations and received 95 percent compliance. The remaining recommendations chiefly address future controls for the TSP's new record keeping system as it moves past its June 2003 implementation. This high compliance rate with audit recommendations is due in large part to the longstanding and positive working relationship between the Department and the TSP service providers and fiduciaries throughout all phases of the FERSA compliance audit program.

However, as you are no doubt aware, there have been some issues about which we and the prior Board have disagreed. These issues arose in the context of the Board's 2001 lawsuit against American Management Systems (AMS) alleging failure to perform and fraud in connection with its contract to provide new record keeping software. (AMS subsequently filed suit against the Board in the U.S. Court of Federal Claims claiming wrongful discharge.) The disagreements were the decision by the prior Board to retain, at considerable expense to the plan, outside counsel to represent it in this litigation and the accounting of the costs for the failed systems development. Though unable to take direct enforcement action on these matters, the Department referred its findings to the GAO and OMB, and discussed the issues with the Congressional Committees of jurisdiction, including this Committee's Civil Service Subcommittee.

We look forward to working with the recently appointed Executive Director, Mr. Gary A. Amelio, and the members of the Board, most of whom were recently appointed by the President. The new Board has been very cooperative with the Department, and we anticipate continuing a free and candid exchange of views that will greatly benefit the TSP participants and beneficiaries, not to mention helping to fulfill the responsibility of the Department of Labor.

CONCLUSION

This concludes my prepared remarks. Thank you for the opportunity to testify before you today regarding this important matter. We look forward to working with the members of this Committee and the Thrift Investment Board in this endeavor, and I am happy to answer any questions you may have.